INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	11
APPENDICES:	
A. Opinions and Orders Below	1a
B. Statutes	26a
C. Resolution of Massachusetts Consumers' Council	41a
D. Federal Power Commission's Order to Show Cause	43a

CITATIONS

CASES:

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967)	6
New England Electric System, 38 S.E.C. 193 (1958)	3
New England Electric System, et al., 41 S.E.C. 888 (1964)	3, 4
New England Electric System v. *Securities and Exchange Commission*, 346 F.2d 399 (1st Cir. 1965)	4
New England Electric System v. *Securities and Exchange Commission*, 376 F.2d 107 (1st Cir. 1967)	4

Page

Securities and Exchange Commission v. *New England Electric System*, 384 U.S. 176 (1966) 2, 4, 6, 7

Securities and Exchange Commission v. *New England Electric System*, 390 U.S. 207 (1968) 2, 4, 6, 7

United States v. *E. I. DuPont DeNemours & Co.*, 366 U.S. 316, 325 (1961) 6

STATUTES:

Public Utility Holding Company Act of 1935, 15 U.S.C. § 79a, et seq. 2, 3, 4, 6, 7, 9, 10, 11

Section 1, 15 U.S.C. § 79a 3, 8

Section 2(a)(11)(A), 15 U.S.C. § 79b(a)(1)(A) 3, 8

Section 9, 15 U.S.C. § 79i 3, 8, 10

Section 10, 15 U.S.C. § 79j 3, 8, 10

Section 11, 15 U.S.C. § 79k 3, 4, 8, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

ASSOCIATION OF MASSACHUSETTS CONSUMERS, INC.,
Petitioner,

v

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Association of Massachusetts Consumers, Inc. ("Association"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 24, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit sought to be reviewed here is reported at 516 F.2d 711 (D.C. Cir. 1975), and is reprinted in Appendix A, *infra*, pp. 1a-9a.

The memorandum opinions and orders of the Securities and Exchange Commission ("SEC") issued on October 31, 1973 and January 11, 1974, and affirmed by the court below are reprinted in Appendix A, *infra*, pp. 10a-25a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether SEC, in carrying out a divestiture twice mandated by this Court (*Securities and Exchange Commission* v. *New England Electric System*, 384 U.S. 176 (1966); 390 U.S. 207 (1968)) denied consumer interests the protection required by those mandates and by the Public Utility Holding Company Act of 1935, when SEC accepted and approved an out-of-time plan for the sale of securities by a registered holding company to an exempt holding company and did so without investigation and without hearing, although consumer interests credibly challenged the lawfulness of the transaction and sought an investigation and hearing.

2. Whether SEC, in administering divestiture relief under the Public Utility Holding Company Act of 1935 and the mandate of this Court, impermissibly failed to enforce the policies of the law with respect to holding companies which favor consumer interests and require the application of antitrust principles to utility regulation.

STATUTES INVOLVED

The statutory provisions involved are Sections 1, 2, 9, 10, and 11 of the Public Utility Holding Company Act ("Act"), 15 U.S.C. 79a, 79b, 79i, 79j and 79k. The relevant excerpts are printed in Appendix B, *infra*, pp. 26a-41a.

STATEMENT

The Association files this petition with the endorsement and support of the Massachusetts Consumers' Council, an agency of the Commonwealth of Massachusetts, in order to maintain and defend consumer interests, which although protected by the Public Utility Holding Company Act of 1935, have otherwise been unrepresented in this case.[1]

In 1957 SEC instituted proceedings under Section 11 of the Act to determine whether the New England Electric System ("NEES"), a public utility holding company registered under the Act, was to be permitted to retain an aggregate of eight gas and seven electric utility systems which it then controlled. SEC determined that the electric properties constituted a single integrated system (*New England Electric System*, 38 S.E.C. 193 (1958)), which NEES elected to retain, and in 1964 ordered divestiture of the eight gas utility companies held by NEES (*New England Electric System, et al.*, 41 S.E.C. 888 (1964)).[2]

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[1] Appendix C, *infra*, pp. 42a, is a copy of a Resolution adopted by the Massachusetts Consumers' Council on September 11, 1975, supporting the petitioner's position herein.

[2] The eight companies were: Central Massachusetts Gas Company, Lawrence Gas Company, Lynn Gas Company, Mystic Valley Gas Company, North Shore Gas Company, Northampton Gas Light Company, Norwood Gas Company and Wachusett Gas Company. SEC acknowledged that these companies constituted a single integrated gas utility system. (41 S.E.C. 888)

Successful appeals by NEES were twice taken through the Court of Appeals for the First Circuit to this Court and twice this Court reversed the appellate decisions. In its second decision, rendered March 5, 1968, this Court directed that a judgment be entered affirming the Commission's 1964 order.[3] That judgment was issued on April 3, 1968 by the First Circuit, thus ostensibly terminating a protracted and major disagreement in favor of SEC's exercise of its responsibilities under the Act, and activating those provisions of the Act under which the Commission must discharge further responsibilities to accomplish, "as soon as practicable,"[4] the divestiture program it had initiated in the public interest in 1957.

Thereafter proceedings in this cause slowed to the stateliness and imperceptibility of geologic time. The "as soon as practicable" scheduling of divestiture was abandoned by SEC, and the April 1970 deadline imposed by Section 11(e) of the Act was ignored. NEES's first divestiture plan was not filed until September 1, 1971, and was limited in scope, relating to only four small companies.[5] Not until March 1973 did

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[3] The various opinions and orders comprising this saga are listed for convenience: *New England Electric System*, 41 S.E.C. 888 (1964), *affirmed initially*, *SEC* v. *New England Electric System*, 384 U.S. 176 (1966), *reversing* 346 F.2d 399 (1st Cir. 1965); *affirmed on second appeal*, *SEC* v. *New England Electric System*, 390 U.S. 207 (1968), *reversing*, 376 F.2d 107 (1st Cir. 1967). See also Holding Company Act Release (HCAR) No. 16618, February 24, 1970.

[4] 15 U.S.C. §§ 79a, 79k.

[5] Central Massachusetts Gas Company, Norwood Gas Company, Wachusett Gas Company and Northampton Gas Company. HCAR No. 17066, March 25, 1971. Northampton was subsequently acquired by Springfield Gas Light Company as part of the first phase of the divestiture plan adopted by NEES.

SEC notice NEES's proposed divestiture of its Lawrence Gas Company stock to Springfield Gas Light Company, an exempt holding company controlled by the Tenney Group [6] and subsequently merged into Bay State Company, another exempt holding company under the same control.

By petition filed April 9, 1973, the Association requested a hearing on the Lawrence matter and its consolidation with a companion proceeding in which NEES sought approval of its plan for the sale of stock of three other of its subsidiary gas companies to Eastern Gas and Fuel Associates ("Eastern") and in which the Association was granted participation.[7] After a lengthy hearing the Eastern proceeding was settled. With respect to the Lawrence proceeding, SEC took no action on the Association's request for a hearing and consolidation until, in its Memorandum Opinion issued on October 31, 1973 (Appendix B, *infra*, pp. 10a-14a), it summarily denied the Association's request and approved the sale of the Lawrence stock to Springfield. Thereafter, on January 11, 1974, SEC reaffirmed that decision in response to the Association's application for a rehearing (Appendix B,

[6] The Tenney Group is a de facto holding company or organization, unregistered and unregulated, which has brought under common control various gas and electric utility properties operating in Massachusetts, New Hampshire, Pennsylvania, New Jersey and New York, as follows: Brockton-Taunton Gas Company; Concord Electric Company; Exeter and Hampton Electric Company; Fitchburg Gas and Electric Light Company; Orange and Rockland Utilities, Inc. (See FPC September 15, 1975 Order to Show Cause, reprinted in Appendix D, *infra*, pp. 43a-49a.)

[7] The two plans constituting the last phase of the NEES divestiture were concurrently before the Commission, i.e., Administrative Proceeding File No. 3-4053, the Lawrence proceeding; and Administrative Proceeding File No. 3-4052, the Eastern proceeding.

infra, at pp. 15a-25a). By an opinion filed July 24, 1974, appeals for the District of Columbia Circuit sustained SEC's action (Appendix B, *infra*, at pp. 1a-9a).

REASONS FOR GRANTING THE WRIT

1. The Court Should Compel Full Obedience to Its Mandates in This Case.

Certiorari will invoke the supervisory power of this Court to enforce and make meaningful the divestiture it has twice approved in *SEC* v. *NEES* and which is required by the Public Utility Holding Company Act of 1935. This Court has both the authority and the disposition to require its mandates to be fully carried out. See *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *United States* v. *E.I. DuPont DeNemours & Co*, 366 U.S. 316, 325 (1961).

By permitting Lawrence Gas Company to be belatedly transferred from NEES to the Tenney Group under the aegis of this Court's opinions and the Act without any hearing or investigation, and over the protests of the Association, SEC has seriously misconstrued this Court's mandate, and has failed to fulfill its own enforcement role in the administration of relief. This Court could hardly have had in mind, when it supported SEC's position in the litigation back in 1968 and earlier, that SEC would falter and slacken in its enforcement efforts, and would fail to apply the standards of the Act in carrying out the divestiture it was seeking. But that is precisely what SEC has done, with the result that the entire exercise has been rendered futile in that it has not resulted in significant relief. In terms of consumer benefit and public interest, nothing has been accomplished beyond the termination of common proprietorship over gas and electric

distribution properties in Lawrence's service area. State Utility Commission control over such service makes this a marginal benefit. And transfer of control over Lawrence Gas Company from a *regulated* holding company with electric utility interests to an *unregulated* holding company with electric utility interests is not simply meaningless; it is counterproductive.

Although it is *prima facie* suspect, this transfer has remained untested by adversary proceedings. Such proceedings, with the participation of the Association, could have explored alternative divestiture proposals, such as spin-off or sale to independent investors. Administrative consideration of such proposals would seem better to serve public interests and consumer rights by promising, not a diluted, ambiguous and absentee operation serving the needs of a multi-state multi-utility holding group, but instead a management wholly concerned with the interest of Lawrence Gas Company and the municipality and customers upon which it should depend. In the light of such proceedings the significance of the Tenney Group's acquisition of the Lawrence property could have been explored and a factual basis established for predicting its impact upon the consumer interests which the Act and this Court have sought to protect. Indeed, the proceedings might have shown that an independent Lawrence Gas Company would have provided yardstick competition for the giant utilities which today dominate gas distribution in Massachusetts.

SEC's performance in the Lawrence proceeding has been truly amazing. It usurped the function of this Court by varying from the mandates of *SEC* v. *NEES*.

It abdicated its own function in two respects. First, it ignored its statutory duty to protect consumer interests, refusing meaningful intervention to consumers represented by the Association (the only consumer entity which sought intervention), and failing to conduct an investigation and hearing so that the public interest factors in the divestiture could be evaluated and protected in the light of a developed record. Second, SEC departed from the legal norms established by the Act and endorsed by this Court to test the NEES divestiture and the Tenney Group acquisition, namely the antitrust and consumer public interest standards embodied in Sections 1, 9, 10 and 11 of the Act.

To illustrate the lawlessness of SEC's treatment, consider the affiliate question. Springfield had acquired Northampton Gas Light Company through a previous divestiture sale by NEES. Thereby Springfield became an "affiliate" of Lawrence as defined by Section 2(a)(11)(A) of the Act. An affiliate relationship triggers SEC investigations and requires SEC approval of the proposed acquisition pursuant to Sections 9 and 10 of the Act. SEC ignored these requirements of law, and did not deal substantively with the matter by investigation, hearing and formal approval. Instead it claimed that the "substance" of the transaction took it out of the Act. And this despite the fact that Congress expressly provided in Section 10 for SEC investigation and approval of a proposed acquisition offered, as was this one, to comply with a Section 11(b) divestiture order. If SEC had done its duty it would have found that the divestiture of gas utility companies from the economically powerful control of NEES into the concentrated control of the Tenney Group was inconsistent with the provisions

of 10(b) of the Act proscribing acquisitions which tend toward interlocking relations of a kind or to an extent detrimental to the public interest or the interest of investors.[8]

2. This is an Important Test Case Which Will Determine the Direction and Efficacy of SEC Enforcement of the Public Utility Holding Company Act With Respect to Combination Electric/Gas Utilities.

Back in 1957 when SEC began this entire proceeding, it was recognized as the demonstration or trial run of SEC's powers under the Act to deal with the anti-competitive problems posed by combination electric/gas utilities. Today there are seventy-six such utilities, each with annual operating revenues in excess of $1 million.[9] To the extent that these utilities are vulnerable under the standards of the Act because of holding company involvement,[10] the outcome of this case will determine whether SEC will proceed against them, and if it does, whether consumer interests will be granted effective participation to carry out the purposes of the Act.

If the public benefits flowing from the enforcement of the Act are as miniscule as the present status of this test case indicates, the case will have demonstrated that as a practical matter enforcement of the Act is a game to be played or forfeited at the uncontrolled

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[8] See Appendix D *infra*.

[9] FPC Document S-247: Statistics of Privately Owned Electric Utilities in the United States.

[10] Under the Act SEC has jurisdiction over seventy-eight electric and/or gas utility subsidiaries in twenty active holding companies controlling $33 billion in assets. See SEC 1974 Annual Report, Tables 27 and 28, pp. 176, 177.

option of SEC, and a game to be won by utility interests willing to play on and on forever. Such a conclusion flies in the face of the Act itself, flouts the earlier decisions of this Court in this case, and rewards unregenerate and protracted resistance to the enforcement powers with ultimate victory.

Moreover, unless *certiorari* is granted, and effective and meaningful relief achieved in this test case, its second teaching will be made clear: that responsible consumer interests can claim no significant participation in the enforcement of the Act. The Court should be aware that this is the only test case to survive out of the entire NEES proceedings. The first four divestitures in this litigation were small and insignificant, and SEC's approval of them went unchallenged. The next three—the Eastern proceedings, wherein the Association actively participated—resulted, after extended investigative hearings, in a settlement of the consumer issues which was secured in part by the Association. Under that settlement the affected municipalities were given options to acquire the divested systems for municipal operation.

The last remaining divestiture is the present case, wherein the Association has been denied a hearing and effective participation, and the outcome of this case, if unreversed, is a travesty which will certainly not stimulate any further efforts by SEC to enforce the Act and will with equal certainty discourage consumer organizations from involving themselves with it. On the other hand, if the Lawrence Gas Company were to be divested in full compliance with all of the provisions of the Act, including the standards of Sections 9, 10 and 11, with due attention given to the interests of

consumers as well as investors, it would serve as a model after which future SEC compliance programs can be patterned.

Either way, the lesson of this case will not be lost on the combination electric/gas utilities which are vulnerable under the Act.

CONCLUSION

The Court below, by sustaining SEC's position in the Lawrence proceeding, adopted as its own the grave legal error committed by SEC as hereinbefore shown. Accordingly the writ prayed for should issue.

Respectfully submitted,

Association of Massachusetts Consumers
By: Rowley & Scott
Worth Rowley
James F. Fairman, Jr.
Patrick F. Martin